In the High Court of Judicature at Madras

Dated: 4.12.2007

Coram:

The Honourable Mr.Justice K.Raviraja Pandian
and
The Honourable Mrs.Justice Chitra Venkataraman

Tax Case (Appeal) No.1474 of 2007

Commissioner of Income Tax, Chennai. . Appellant/Appellant

vs.

M/s.Carborandum Universal Ltd.,
Parry House
43 Moore Street,
Chennai-600 001. .. Respondent/Respondent

Tax Case (Appeal) against the order of the Income Tax Appellate Tribunal "A" Bench, Chennai, dated 11.1.2007 in I.T.A.No.779/Mds/2005 against the order of the Commissioner of Income Tax (Appeals) VIII, Chennai dated 24.12.2004 in ITA TR No.146/2004-2005 for the Assessment Year of 1991-92 GI No.AAACC 2474B and against the order of Deputy Commissioner of Income Tax Company Circle I(3) Chennai-34, dated 28.11.2003 for the years of 1991-92 and the Commissioner of Appeals V Madras-34 ITA No.437/93-94, dt.17.1.95 PA GIR No. 47-066 CX-3335 and ITA No.340/93-94/ DC-SR.VI, dt. 31.1.94 against Deputy Commissioner of Income Tax, Special Range VI, Madras-34 dated 30.11.93 for the Assessment Year 1991-92.

For appellant : Mr.J.Naresh Kumar

Judgment

(The Judgment of the Court was delivered by K.Raviraja Pandian,J)

The relevant assessment year is 1991-1992.

2. The assessee (respondent) is a Company in which the public are substantially interested. The respondent-Company is manufacturing and selling abrasives, refractors, grinding wheels, etc. In respect of assessment year 1991-1992, the assessee filed return and claimed deduction under Section 35-AB of the Income Tax Act (hereinafter referred to as 'the Act') being 1/5 of the technical know-how fee and depreciation under Section 32 of the Act on the technical know-how by

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including it in the cost of plant.

3. The depreciation was disallowed by the assessing officer on the opinion that it would amount to double deduction and the assessee is not entitled to double deduction.

4. Consequent to that order, penal proceedings under Section 271 (1)(c) of the Act was initiated and penalty was levied, as the assessee had made excess claim, giving inaccurate particulars in order to evade tax.

5. Aggrieved by the order of the imposition of penalty by the assessing officer, the assessee filed appeal before the Commissioner of Income Tax (Appeals), who held that the assessee was under the bona-fide impression that he was entitled to double deduction and claimed the same. He further recorded a factual finding that at the time of filing of the return, the issue as to the claim of double deduction was not settled, rather it was in favour of the assessee in the sense that the assessee could claim double deduction. However, the Supreme Court, in the case of Escorts Ltd. vs. Union of India [(1993) 199 ITR 43), held that the double claim of benefit against the same item was prohibited. The said judgment was delivered on 22.10.1992. Hence, the claim of the assessee for double deduction could not be regarded as filing an incorrect and inaccurate return so as to attract the penal provision under Section 271(1)(c) of the Act.

7. The Revenue, not satisfied with the order of the Commissioner of Income Tax (Appeals), carried on the matter on appeal to the Tribunal and the Tribunal dismissed the appeal on the same reasonings given by the Commissioner of Income Tax (Appeals), and the correctness of the same is now canvassed before us in this appeal by formulating the following substantial question of law:

> "Whether in the facts and circumstances of the case, the Tribunal was right in deleting the penalty under Section 271(1)(c) of the Act levied on the assessee?"

8. Heard the argument of the learned Standing Counsel appearing for the appellant-Revenue and perused the materials available on record.

9. The Tribunal, after hearing the parties and taking into account the materials available on record, held that even double deduction was allowable in view of various decisions of Courts, particularly the decision of the Bombay High Court reported in [1991] 187 ITR 517 (C.I.T. vs. Mico Products Pvt. Ltd.) and the decision of the Supreme Court reported in [1993] 199 ITR 43 (cited supra) delivered by the Apex Court on 22.10.1992, by which the law has been

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settled to the effect that the benefit of double deduction in respect of the same item was prohibited.

10. From the materials available on record, the Tribunal recorded a finding that it was clear that the assessee-Company had bona-fide belief that it was entitled for two claims, in respect of the same item under Section 35-AB as well as Section 32 of the Act. The action of the assessee in claiming the benefit under the above said provisions, cannot be regarded as false claim or furnishing inaccurate particulars.

11. In the decision of the Supreme Court reported in [{2007} 292 ITR 11 (SC)] (T.Ashok Pai vs. CIT), the Supreme Court held as follows:

> "It is therefore, trite that if an explanation given by the assessee with regard to the mistake committed by him has been treated to be bona fide and it has been found as of fact that he had acted on the basis of wrong legal advice, the question of his failure to discharge his burden in terms of the *Explanation* appended to section 271(1)(c) of the Income-tax Act would not arise.
>
> In *Dilip N. Shroff* v. *Joint CIT* (Civil appeal arising out of SLP (C) No.26831/2004) delivered today (2007) 291 ITR 519 (SC), this Court observed (see page 546 of 291 ITR):
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> "The expression 'conceal' is of great importance. According to *Law Lexicon*, the word 'conceal' means:
>
> 'to hide or keep secret. The word 'conceal' is con+celare which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income-tax authorities.'
>
> In *Webster's Dictionary*, 'inaccurate' has been defined as:
>
> 'not accurate', not exact or correct; not according to truth;; erroneous; as an inaccurate statement, copy or transcript."
>
> It signifies a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of

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income or furnishing of inaccurate particulars.

The term "inaccurate particulars" is not defined. Furnishing of an assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the explanations are taken recourse to, a finding has to be arrived at having regard to clause (A) of *Explanation* 1 that the Assessing Officer is required to arrive at a finding that the explanation offered by an assessee, in the event he offers one was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which were material to the computation of his income.

The explanation having regard to the decisions of this court, must be preceded by a finding as to how and in what manner he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income-tax Officer must arrive at his satisfaction in this behalf. (See *CIT* v. *Ram Commercial Enterprises Ltd.* [2000] 246 ITR 568 (Delhi) and *Diwan Enterprises* v. *CIT* [2000] 246 ITR 571 (Delhi)).

The order imposing penalty is quasi-criminal in nature and, thus, the burden lies on the Department to establish that the assessee had concealed his income. Since the burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitutes good evidence in the penalty proceeding. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle.

It is now a well-settled principle of law that the more stringent the law, the more strict a construction thereof would be necessary. Even when the burden is required to be discharged by an assessee, it would not be as heavy as the prosecution. (See *P.N.Krishna Lal* v. *Government*

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of Kerala [1995] Supp 2 SCC 187).

The omission of the word "deliberate", thus, may not be of much significance.

Section 271(1)(c) remains a penal statute. The rule of strict construction shall apply thereto. The ingredients for imposing penalty remain the same. The purpose of the Legislature that it is meant to be a deterrent to tax evasion is evidenced by the increase in the quantum of penalty, from 20 per cent. under the 1922 Act to 300 per cent in 1985.

"Concealment of income" and "furnishing of inaccurate particulars" carry different connotations. Concealment refers to a deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of *suppressio veri or suggestio falsi*.

We may notice that in *Addl. CIT* v. *Jeevan Lal Sah* [1994] 205 ITR 244 this Court dealt with the amendment of section 271(1)(c) made in the year 1964 to hold (page 248):

> "Even after the amendment of 1964, the penalty proceedings, it is evident, continue to be penal proceedings. Similarly, the question whether the assessee has concealed the particulars of his income or has furnished inaccurate particulars of his income continues to remain a question of fact. Whether the *Explanation* has made a difference is — while deciding the said question of fact the presumption created by it has to be applied, which has the effect of shifting the burden of proof. The entire material on record has to be considered keeping in mind the said presumption and a finding recorded."

The question came for consideration of this court yet again in *K.C.Builders* v. *Asst. CIT* [2004] 265 ITR 562; [2004] 2 SCC 731 wherein it was held (page 569):

> "One of the amendments made to the abovementioned provisions is the omission of the word 'deliberately' from the expression 'deliberately furnished inaccurate particulars of such income'. It is implicit in the word 'concealed' that

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there has been a deliberate act on the part of the assessee. The meaning of the word 'concealment' as found in *Shorter Oxford English Dictionary*, third edition, Volume I, is as follows:

'In law, the intentional suppression of truth or fact known, to the injury or prejudice of another.'

The word 'concealment' inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if it takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under section 271(1)(iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income."

The said principle has been reiterated in *Virtual Soft Systems Ltd.* v. *CIT* [2007] 2 Scale 612 (SC) : (2007) 289 ITR 83 (SC), where it was held (see page 97 of 289 ITR):

"24. Section 271 of the Act is a penal provision and there are well established principles for the interpretation of such a penal provision. Such a provision has to be construed strictly and narrowly and not widely or with the object of advancing the object and intention of the Legislature."

Referring to a large number of decisions, it was furthermore observed: (see page 98 of 289 ITR):

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"27. Every statutory provision for imposition of penalty has two distinct components:

(i) That which lays down the conditions for imposition of penalty.

(ii) That which provides for computation of the quantum of penalty. Section 271(1)(c) and clause (iii) relate to the conditions for imposition of penalty, whereas, on the other hand, *Explanation 4* to section 271(1)(c) relates to the computation of the quantum of penalty.

28. The provisions of section 271(1)(c)(iii) prior to April 1, 1976, and after its amendment by the Taxation Laws (Amendment) Act, 1975 with effect from April 1, 1976, the later provisions being applicable to the assessment year in question, are substantially the same except that in place of the word 'income' in sub-clause (iii) to clause (c) of section 271 prior to its amendment by the Taxation Laws (Amendment) Act, 1975, the expression 'amount of tax sought to be evaded' have been substituted. *Explanation 4* inserted for the purpose of clause (iii) where the expression 'the amount of tax sought to be evaded', was inserted had in fact made no difference in so far as the main criteria, namely, absence of tax continued to exist, prior to or after April 1, 1976, changing only the measure or the scale as to the working of the penalty which earlier was with reference to the 'income' and after the amendment related to the 'tax sought to be evaded'. The sine qua non which was there prior to or after the amendment on April 1, 1976, was the fact that there must be a positive income resulting in tax before any penalty could be levied continued to exist. The penalty imposed was in 'addition to any tax'. If there was no tax, no penalty could be levied. The return filed declaring loss and assessment made at a reduced loss did not warrant any levy of penalty within the meaning of section 271

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(1)(c)(iii) with or without *Explanation 4."*

12. In the light of the exposition of law of the Apex Court, this appeal of the Revenue, is dismissed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. Commissioner of Income Tax (Appeals) (V),
   121, Mahatma Gandhi Road, Chennai-600 034.

2. Commissioner of Income Tax (Appeals) (VIII),
   121, Mahatma Gandhi Road, Chennai-600 034.

3. The Assistant Registrar, Income Tax Appellate Tribunal,
   "A" Bench, III Floor, Rajaji Bhavan, Besant Nagar,
   Chennai-600 090.

3a.Deputy Commissioner of Income Tax,
Special Range VI, Madras -34.

3b.Deputy Commissioner of Income Tax,
Company Circle I (3), Chennai-34.

4. The Secretary, Central Board of Direct Taxes, New Delhi.

5. The Commissioner of Income Tax, Chennai.

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+1cc to Mr.Pushya Sitaraman, Advocate Sr 71343

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